



David A. Paterson  
Governor

**STATE OF NEW YORK**  
EXECUTIVE DEPARTMENT  
CONSUMER PROTECTION BOARD

Mindy A. Bockstein  
Chairperson and Executive Director

March 30, 2009

Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551

*Submitted via email to [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)*

Re: Docket No. R-1343, Amendment of Rules of Regulation E, implementing the  
Electronic Fund Transfer Act

Dear Ms. Johnson:

On behalf of the New York State Consumer Protection Board (CPB), I am pleased to submit comments on proposed amendments to the rules of Regulation E, implementing the Electronic Fund Transfer Act (EFTA).

The CPB was established in 1970 pursuant to New York Executive Law Sections 552 and 553. It is the mission of the CPB to protect, educate, and represent consumers. The CPB is dedicated to initiating policy and formulating informational and educational outreach programs. The CPB recently completed comprehensive consumer educational materials on financial literacy, identity theft, and credit card management. Our Consumer Assistance Unit (CAU), which takes complaints five (5) days a week, 8:30 a.m. to 4:30 p.m., via our toll-free helpline at 1-800-697-1220 and twenty-four (24) hours a day, seven (7) days a week via the web at [www.nysconsumer.gov](http://www.nysconsumer.gov), responds to and resolves more than 20,000 complaints and inquiries a year on a variety of topics, including banking problems, credit card disputes, identity theft, and product refunds and returns.

Many consumers have become unknowingly ensnared by banking institutions that permit consumers to withdraw money or make a purchase with an ATM or debit card, when the account actually has insufficient funds to support such a transaction. The bank unilaterally provides an overdraft protection service to support the transaction, and then charges the consumer a fee for providing the customer with such "assistance." The consumer often remains unaware of their true balance or financial circumstances until they have already made a number of purchases using an account with insufficient funds, and incurred a fee with each transaction. This practice is innately unfair to the consumer because the banking institution is making an affirmative decision not to disclose a consumer's financial status, in order to encourage the customer to continue



to engage in transactions that prompt overdraft coverage and result in the consumer incurring additional fees, which on average amount to just over \$26 *per transaction*.<sup>1</sup>

An example of how such practices affect even the most diligent consumer is articulated in a dispute case which the CPB attempted to address for Kelly. Kelly is a Key Bank customer. As many consumers do, she miscalculated the amount in her checking account and, as a result, overdrew her account in the amount of \$576.26. All but two (2) of her overdrawn transactions were made via debit card - - one transaction totaling a whopping \$1.99. For each of the nine (9) overdrawn transactions that she or her husband made, she was assessed a fee of \$38.<sup>2</sup> Realizing her mistake, Kelly obtained a bank check from another financial institution with which she banks and quickly deposited \$5,011.54 into her Key Bank account. Because her deposit was in the form of a bank check, she was told by the Key Bank teller that her account would be credited immediately, and there would be no holds placed on her funds. Kelly and her husband, believing there to be ample funds in their account, continued to use their debit cards in the following days. All in all, they made nine (9) debit card purchases with their cards, believing all of them would be amply covered by the \$5,000 deposit and a directly deposited paycheck.

Key Bank had other plans. Despite telling its customer that the bank check would be processed like cash, the Bank placed a hold on it. As a result, in addition to the \$380 in fees that it charged Kelly and her husband for the debits made before she deposited \$5,000 into her account, Key Bank socked them with another \$380 assessment for \$459.75 in debit card charges, for a total of \$760 worth of overdraft fees. Kelly paid a fee of \$38 for a \$7.64 meal at McDonalds, and yet another fee of \$38 for \$10.80 worth of flowers for a sick family friend.

When Kelly, and the CPB on her behalf, contacted Key Bank, they refunded only \$190 of the \$760 they charged her, even though Kelly had been specifically told by a Key Bank teller that her bank check deposit would be immediately available. Kelly still was left \$570 poorer for the “courtesies” that Key Bank bestowed upon her. Under the circumstances, Kelly, and indeed any consumer, would rather have had Key Bank deny all of her debit card transactions due to insufficient funds, rather than to be repeatedly charged a fee of \$38 for each transaction as a “courtesy.”

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<sup>1</sup> *Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts*, GAO Report 08-281, at 14 (January 2008).

<sup>2</sup> Actually, Kelly was assessed 10 overdraft item charges even though she made only 9 transactions for which there were insufficient funds.



The conduct by banks and credit unions as described above amounts to highway robbery. Without full disclosure, banks and credit unions are collecting, by one account, \$17.5 billion per year in overdraft fees.<sup>3</sup> These fees are most frequently assessed against middle income and lower-income Americans, particularly the young and the elderly.

As the CPB articulated in its July 17, 2008, comments to the Board on the proposed amendments to Regulation DD implementing the Truth in Savings Act, overdraft fees are simply just loans at egregious interest rates. The proposed amendment to Regulation DD to provide consumers notice of their ability to opt out of such overdraft protection was an acknowledgement from the Board that something should be done. Nonetheless, it did not go far enough to protect consumers from needlessly incurring overdraft fees when using their ATM or debit cards. The CPB has asserted that consumers should affirmatively opt-in to avail themselves of overdraft “protections.”

Thus, the CPB commends the Board for contemplating the comments submitted in response to the proposed amendments to Regulation DD, and responding with the proposed amendments to Regulation E implementing the EFTA, which provide improved options and better protections for consumers. We set forth our specific comments below:

### ***Opt-Out of or Opt-In to Overdraft Protection***

Regulation E amendments provide two options for consideration.

#### ***Opt- Out***

1. Permits banks and credit unions to charge overdraft fees to and permit transactions for consumers who attempt to spend or withdraw money from an account with insufficient funds, unless the consumer opts-out of such arrangement, and tells the financial institution not to pay overdrafts for ATM withdrawals or debit card purchases.

It is the CPB’s position that consumers should affirmatively opt-in to avail themselves of overdraft “protection” rather than opt-out. Nonetheless, the opt-out proposal the Board has submitted poses language choices. Thus, the CPB supports for the conditioning of the opt-out in §205.17 (b)(2), the language that provides that a bank *shall not* condition overdraft coverage for checks/ACH payments on the consumer’s

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<sup>3</sup> Center for Responsible Lending, “*Overdraft Loans Trap Borrowers in Debt: Unfair Bank Practices Artificially Increase Fees*” CRL Issue Brief No. 18 (March 2008).



decision, or decline to pay any other overdrafts because the consumer opted out. To use the term *may*, would permit banks to penalize consumers in other overdraft transactions for exercising their choice to opt-out.

Likewise, the CPB supports §205.17 (b)(3), implementation of opt-out alternative A, which requires banks to provide consumers with accounts that have the same terms and conditions regardless of a consumer's decision to opt out of overdraft coverage. Clear, uniform terms for all accounts levels the playing field for consumers.

### *Opt-In*

2. Consumers must affirmatively opt in to permit a bank to pay overdrafts for ATM withdrawals or debit card purchases.

The CPB supports this alternative as the preferred option, since it is the only option that provides consumers the most disclosure. It is the CPB's position that consumers should affirmatively opt-in to avail themselves of overdraft "protection" rather than opt-out. Accordingly, the opt-in proposal also provides clear language choices. Thus, the CPB supports for the conditioning of the opt-out in §205.17 (b)(2), the language that provides that a bank *shall not* condition overdraft coverage for checks/ACH payments on the consumer's decision, or decline to pay any other overdrafts because the consumer has not opted in. To use the term *may*, would permit banks to penalize consumers in other overdraft transactions for exercising their choice not to opt-in.

Likewise, the CPB supports §205.17 (b)(3), implementation of opt-in alternative A, which requires banks to provide consumers with accounts that have the same terms and conditions regardless of a consumer's decision to opt in to overdraft coverage. Clear, uniform terms for all accounts levels the playing field for consumers.

Consumers should not be penalized when exercising their consumer rights or protections

### ***Debit Holds***

Regulation E proposal provides that a bank may not assess a fee for paying an overdraft, if the overdraft would not have occurred but for a debit hold placed on funds in the consumer's account, and the actual amount of the transaction can be determined by the merchant within a short period after the bank authorizes the transaction. The bank is afforded an exception and allowed to charge the fee, if the amount of the



overdraft caused by the debit hold is less than or equal to the actual amount of the transaction. The CPB recognizes the intent of this proposal as a progressive step to affording consumers relief from onerous overdraft fees. Nonetheless, the CPB is concerned that the safe harbor language contained in the proposal may actually preclude such relief from being realized by consumers.

Specifically, the proposal affords banks a safe harbor clause that permits them to assess an overdraft fee if it has procedures in place to release a debit hold within two (2) hours of when the transaction is authorized. The CPB asserts that such clause, while protecting banks, provides no protections or notice requirements for consumers to be cognizant of their responsibility and understand how a debit hold will affect them financially if they make more purchases or withdraw cash. Accordingly, the CPB recommends such provision be removed.

The CPB is encouraged by the Board's recent proposed regulations. Nonetheless, the CPB asserts that the federal government must employ the regulations that provide the greatest consumer protections, especially given this economy, and require that consumers affirmatively opt-in to overdraft plans. Thank you for your consideration of our comments.

Sincerely,



Mindy A. Bockstein  
Chairperson and Executive Director



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